DOCUMENT RESUME

ED 248 580 EA 017 043

AUTHOR Carrere, Thomas A.
TITLE Legal Aspects of Home Instruction.
PUB DATE 14 Nov 83
NOTE 22p.; Paper presented at the Annual Conference of the Southern Regional Council on Educational Administration (Knoxville, TN, November 13-15, 1983).
PUB TYPE Legal/Legislative/Regulatory Materials (090) -- Speeches/Conference Papers (150)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS Attendance; *Civil Liberties; *Compulsory Education; *Court Litigation; Elementary Secondary Education; *Home Schooling; *Parent Rights; Private Education; Public Education; Religion; *School Attendance Legislation; School Law; State Legislation

ABSTRACT

The nationwide phenomenon of home instruction is meeting resistance from state compulsory school attendance laws, resulting in many court cases in recent years. Parents who choose to teach their children at home may do so on moral or religious grounds, or because they consider public schools too conservative or traditional. State compulsory attendance laws have been based on the desire to "Americanize" immigrants, the consideration for the welfare of the child and the community, and the safety of the state. Therefore, this duty of education for the public good has been the prosecuting argument in questions of schooling. The right of parental authority has been one defense against such regulation, resulting in a restriction on state public education mandates, thus allowing private schools. Recent home instruction cases, however, have shown that state laws allowing private school attendance are often not specific, sometimes making prosecution difficult since the right to home instruction may or may not be implied. The right to free exercise of religion can be a successful defense, but stringent requirements must be met in order for the parent's religious interest to balance the state's interest in compulsory education. It is suggested that consideration of the rights of children must come first in these cases. (DCS)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

This document has been reproduced as received from the person or organization originating it.
Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

Thomas A. Carrere

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

FA

ED248580

LEGAL ASPECTS OF HOME INSTRUCTION

Thomas A. Carrere, Ph.D.
Department of Educational Leadership
School of Education
West Georgia College
Carrollton, GA 30118

Southern Regional Council on
Educational Administration
University of Tennessee-Knoxville
November 14, 1983

EA 017 013

The public schools have always been beset with problems. Today is no exception. Declining enrollments, reduction in force, a government term that has taken on an ominous meaning for personnel in school districts throughout the country, increasingly scarce resources (public education is having to compete with prison systems and health services for a scarce state tax dollar.) In 1978-1979 a historic event occurred largely unnoticed except by people interested in school finance: in that year the percentage of state funds expended for public education, nationwide, exceeded those from either federal or local sources. This development confirms the increasing importance of the state in public education. If the statement: public education is a federal concern, a state responsibility, and a local function holds true, then the state responsibility has taken on added importance in recent years.

Along with increased interest in tuition tax credits and continuing interest in vouchers another development has taken place that, by its nature and impact, indicates a diminishing support of public schools: the nationwide phenomenon of home instruction. The significant feature of home instruction is that it strikes directly at the concept that the state has a compelling interest in assuring that children are provided a minimum level of formal education.

A broad definition of home instruction would be one wherein parents/guardians have said, in effect, "A pox on both public and private schools. I'll assume the responsibility of educating my child at home, based on my personal and/or religious beliefs." This decision constitutes a ringing declaration of independence by an increasing number of parents/guardians from the alleged tyranny of state laws - and every state presently has some type of compulsory school attendance law - whereby a child of a prescribed age must attend a public or private school.

Although education has been encouraged in this country going back to Jefferson's concept of a universal educational system, and many states had enacted compulsory attendance laws by the end of the 18th century, for the most part the laws were not well enforced due to inertia, desire to profit from child labor, and the state's reluctance to interfere in what many believed to be a domestic matter. It wasn't until 1890 or thereabouts that enforcement of compulsory attendance laws began to take place. One strong impetus was to "Americanize" the large number of immigrants entering the country. Several court cases supported the constitutionality of compulsory schooling on the grounds of "welfare of the minor" and on the basis that education safeguards the welfare of the community and the safety of the state.

The appearance of school censuses around 1900 made enforcement of school statutes more effective. After 1905, with legal restrictions on child labor, attendance laws were strengthened.

Granted the approach to regulation of nonpublic schools is sometimes ill-conceived, some kind of control grows out of the belief that the state must, as a means of self-protection and survival, require for all children an education essential to good citizenship. The state courts have generally defended this concept in many compulsory attendance cases, holding that an education is not so much a right guaranteed the individual as a duty imposed on him for the public good.

Assuming that parents, not the state, have the right to direct the upbringing of children according to their own views, then Pierce v. Society of Sisters[1], a 1925 Oregon statute requiring children to attend only public schools, is a leading case. The Oregon statute was struck down by the U.S. Supreme Court. In the Court's decision there is the statement, "The fundamental theory of liberty upon which all governments in the Union repose excludes any general power of the State

to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty to recognize and prepare him for additional obligations."[2]

It is important to remember that Pierce was more a 14th amendment property right case than a First amendment case but the U.S. Supreme Court's decision clearly affirms that no amount of compelling interest can sustain a statute mandating only public education for the young. For the Court to have ruled otherwise in Pierce would have been to install the State as Parens Patriae or the exclusive schoolmaster to our youth.

The argument is not with the right of the state to enact compulsory attendance laws. This right is an exercise of the police power of the state. It is clearly supported by the Court in Meyer V. Nebraska.[3]

Further support is found in Prince v. Massachusetts,[4] where the Court declared

> But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. Reynolds v. U.S.[5]; Davis v. Beason[6]. And neither rights of religion nor rights of parenthood are beyond limitations. Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parents' control by requiring school attendance,[7] regulating or prohibiting the child's labor,[8] and in many other ways.[9]

The reasons why parents are opting to educate their children at home are various. Some have rejected public education as being too conservative or traditional. An increasing number of parents base their decision for home instruction on deeply felt religious grounds. They honestly believe that the public schools are devoid of the religious and moral instruction they desire for their children. These parents are responsible for the substantial growth of Christian schools.

Regardless of the difference between the beliefs of these two types of parents they have one thing in common: a rejection of the public school as an institution that educates all types of children and a willingness to defy the law in the interests of their children.

How many children are there outside the public schools? Reliable data are hard to come by. Accredited schools are quite visible. However, there are many unaccredited small schools as well as many children educated in the home. Families electing unaccredited schools care nothing about state approval and they probably have no desire to be counted by the Census Bureau. Some of these Chrsitian schools refuse to furnish information on themselves.

One estimate is that there are as many as 15,000 non-Catholic private schools in the United States with an enrollment of approximately two million children. Some believe that the enrollment in these schools is growing at the rate of 100,000 per year.

John Holt, educator and author, keeps tab on the "underground education movement" as he calls it. Holt has a Boston-based organization that provides support services of home instruction. Holt estimates that there are in excess of 100,000 families educating their children at home in violation of compulsory attendance laws. Some believe Holt's estimate is too small.

Traditionally, compulsory attendance laws have enforced minimum standards for private education. Punishment for violating these laws has been directed at parents and children - not at those who provide private instruction. These laws almost always mandated fines and jail sentences for parents who are found in violation. Often, the laws make children subject to truancy charges and possible institutionalization. In nearly every state the local superintendent or school board and the local prosecuting attorney are responsible for identifying truants, i.e., those children not enrolled in an approved educational program. In many states, local officials also have primary responsibility for approving home instructional programs, if such programs are allowed by state law. The criminal sanctions contained in compulsory attendance laws appear to be designed for parents who are found guilty of neglecting their children's education.

There is a wide variety of laws regulating private schools throughout the

states. Some states have deregulated private schools. In these states the statutes expressly limit state administrative authority to promulgate regulations. Tennessee is an example of such a state. North Carolina is another state that has deregulated private schools.[10] At the other extreme is the state of Washington. Although state law prevents state agencies from expanding on statuatory provisions, the existing regulatory provisions are quite demanding. As an example, teacher certification is required of all teachers except those who teach religion. In practice, however, Washington state law does permit waivers and thus there is more flexibility than a reading of the state law would suggest.

With respect to home instruction, laws in more than thirty states permit instruction at home by a parent or sanction instruction at home by a certified teacher (who may also be the parent). Home instruction is also permitted in any state if it meets all the requirements of a private school. It would be difficult for most homes to meet these requirements when they are specifically spelled out in the law.

Whereas the case law is abundant in the area of private schools and the right of parents to direct the upbringing of children under their control, there haven't been in the past many decisions that deal directly with home instruction. However, more decisions are coming down in this area within the past three years.

Of course the leading decision in this area is Wisconsin v. Yoder.[11] In this decision the U.S. Supreme Court held that the Amish were not in violation of the Wisconsin compulsory attendance law by refusing to send their children to public schools beyond the eighth grade. The Court held - with respect to the Amish - that the Wisconsin compulsory attendance law was unconstitutional. In Yoder, the Court held only that a state cannot compel a child to attend a public school in the face of strong religious objections and when the state's interest in the education of the child is adequately served by an alternative

program. This decision is carefully crafted so as to distinguish between philosophical and religious objections to formal schooling. It also considers the long, uninterrupted religious traditions of the Amish.

Can the Yoder decision be extended? It clearly could apply to other religions provided they could convince the Court that they had as deeply held religious conviction and a tradition comparable to the Amish. To limit the exception granted in Yoder to a single religion (Amish) would be patently unconstitutional. To date the Supreme Court has not had occasion to consider extensions of Yoder.

In State v. Riddle[12], the West Virginia Supreme Court refused to extend the dictum of Yoder to "Biblical Christian" parents who chose to educate their 10 and 14-year old children at home. It is significant that from evidence submitted the parents did an acceptable job. The children scored average and above on standardized achievement tests.

West Virginia's compulsory attendance law provides explicit exemption for home instruction, provided that the person(s) providing the instruction satisfy the county board of education with regard to (1) their qualifications to teach the required subjects: (2) the duration and nature of the instruction: and (3) the progress of the pupils. The Riddles failed to request such approval. They waited until their arrest by a local truancy officer to challenge the constitutionality of the statute, claiming it to be an infringement on their free exercise of religion.

Although the West Virginia Supreme Court found the Riddles to be "sincere, dedicated, and competent parents," it concluded that acceptance of their views would imply parents have the right to . . .

> quarter them ~~be~~ in Dickensian squalor beyond the reach of the ameliorating influence of social welfare agencies, and so to separate

> their children from organized society in an environment of indoctrination and deprivation that the children become mindless automatons incapable of coping with life outside their own families.[13]

Other states have taken a similarly restrictive view of Yoder generally upholding the constitutionality of their respective compulsory attendance laws against the free exercise claims of plaintiffs - parents.[14]

The majority of courts have rejected parental claims of a constitutional nonreligious right to educate their children at home.[15]

Only about two-thirds of the states permit home instruction as an implied exception (e.g. "equivalent education . . .elsewhere") or as an explicit exemption to compulsory public or private schooling. A lot depends on the interpretation of the state statutes in the area of home instruction.

In those states that do not have an equivalent or express exemption, parents have argued that home instruction is implicitly included in their statutory allowance of "private" schooling. The majority of courts have rejected this reasoning.[16]

Home instruction is one of those areas where the law still recognizes that the education of children is still recognized to be a societal as well as a parental concern.

Case law is extremely limited in Georgia with respect to home instruction. Anderson v. The State[17] involved parents who refused to have their children vaccinated on religious grounds. The trial court (City Court of Reidsville) found the parents in violation of the compulsory attendance law when they refused to send their children to school after they had been sent home for failure to submit evidence of vaccination.

More to the point is a legal action that deals directly with the legality of home instruction in Georgia.

A case that received considerable media coverage in the Atlanta area was an action in DeKalb County in 1980 where a parent by the name of Blankenship was charged in State Court with violating the compulsory attendance law by electing to teach her two children at home. The state charged that the home instruction did not constitute the operation of a private school. This case clearly illustrates the deficiency in the present Georgia compulsory attendance law,[18] wherein there is no definition of the words, "private schools."

Judging from the newspaper accounts of the Blankenship trial the prosecuting solicitor labored under a great handicap by not being able to cite more specific language in the statute. Apparently the six-person jury must have experienced this same difficulty and was unable to arrive at a verdict. A mistrial was declared. The state decided not to prosecute further.

In the Blankenship case in DeKalb County the state court judge said at the outset that he was going to look at only two issues: whether Mrs. Blankenship had met the state requirements of O.C.G.A. 20-2-697. This statute requires principals/local administrators/teachers of private schools to report, in writing, to the visiting teacher or attendance officer of the county or of the independent school system the names, ages and residence of all pupils in attendance at their schools and classes within 30 days after the beginning of the school term and to make such other reports of attendance in their schools or classes as may be required by rule or regulation of the State Board of Education, and whether daily attendance records were kept. The statute provides that all records kept shall be open for inspection by the visiting teacher, attendance teacher, or duly authorized representative of the local school system.

It would be instructive to review a number of recent court decisions relating to home instruction. These will be examined in chronological order, beginning with

the 1982 decision in Livingston Parish School Board v. Lofton.[19] This case failed to be decided on its merits since the Louisiana Court of Appeal ruled that the local school board asked for monetary damages from the parents for violation of the state's compulsory education law when this type of action constituted a criminal action and could be brought only by the district attorney in the name of the state. The defendants stipulated that their child was not enrolled in any approved home study program - Louisiana law provides for a home study program when approved by the State Board of Education, and that their child had not been in school for 127 days at the filing of the suit. The parents maintained that their religious beliefs prevented their child's return to school.

In State of Oregon v. Bowman,[20] a parent challenged the constitutionality of the Oregon compulsory school attendance statutes and the manner in which they were enforced. The Court of Appeals of Oregon upheld the defendants' conviction of violating the state's compulsory school attendance statute and held that: (1) the exemption provisions were not unconstitutionally vague; (2) the two relevant exemption provisions were not violative of equal protection; and (3) the "parent or private teacher" exemption did not improperly delegate legislative authority to the local school superintendent. The superintendent had refused to grant the parent permission to teach her child at home. Oregon law provides that an appeal to the school board is provided for. However the parent did not appeal and claimed that she did not know about her right to appeal. The Court held that there was no legal requirement that defendant be advised of her right to appeal.

An interesting defense was attempted by parents in the case of Robert Grigg v. Commonwealth of Virginia.[21] Upon being charged with violating Virginia's compulsory school attendance law by withdrawing their children from the public school and instructing them at home, the parents argued that the home instruction was in effect a "private school" and since teachers in private, denominational,

or parochial schools in Virginia are not required to meet the qualifications prescribed by the State Board of Education for tutors or teachers then they too should be absolved from such requirements. The Griggs contended that they were in full compliance with the compulsory school attendance statute. The Court dismissed this argument by concluding that the Griggs were undoubtedly engaged in home instruction and that they could not instruct their children at home as an alternative to public instruction unless they were qualified as tutors or teachers pursuant to the statutes' requirements. The Griggs made no effort to meet the qualifications prescribed by the state board of education and approved by the division superintendent.

The case of State of Wisconsin v. Lawrence Popanz,[22] is one where the state Supreme Court was presented with the issue of whether the phrase "private schools" as used in the state's compulsory school attendance law was impermissibly vague as applied to prosecutions involving "private schools" and consequently violated both the United States Constitution as well as the state's Constitution. (This case takes on added significance since it will be used extensively as a precedent in Roemhild v. State.[23]) In reversing a lower court that had held Popanz guilty of violating the state's attendance law the Wisconsin Supreme Court declared that it had found neither a definition nor prescribed criteria for a "private school." In order to try to resolve this matter the State Superintendent of Public Instruction, in an amicus brief, attempted to define a private school but his definition was given short shrift by the Court which stated: "In any event, the legislation or its delegated agent should define the phrase 'private school'; citizens or the courts should not have to guess at its meaning." The Court goes on to say that persons who must obey the law should not have to guess at what the phrase, "private school" means. Wisconsin law does provide that instruction elsewhere than at school is permitted, provided it is approved by

the state superintendent as substantially equivalent to instruction offered to children in public or private schools.

A more definitive ruling with respect to home instruction is found in State of New Mexico v. Don Edginton.[24] In this case the basic question presented was whether the exclusion of home instruction by a parent of a child from satisfying the requirements of the New Mexico compulsory school attendance law violates equal protection as guaranteed in the United States and New Mexico Constitutions. In reversing an inferior court's decision the Court of Appeals held that the statutory classifications presented in the attendance law related to a legitimate state interest and thus did not constitute an equal protection violation. From the testimony the children involved were being taught at home where material provided by the Christian Liberty Academy, an Illinois-based organization, was used. There is no legal provision for home instruction in the New Mexico compulsory attendance statute.

In a recent decision by the Fourth Circuit Court of Appeals, Peter Duro v. District Attorney, Second Judicial District of North Carolina,[25] it would appear that the vitality of state compulsory school attendance laws has been strengthened. This case presents a decision where the Free Exercise Clause of the First Amendment, as exercised successfully by the Amish parents in Yoder, was invoked unsuccessfully by the appellees. In this case the parents of five school-age children refused to enroll them in either a public or nonpublic school. The Yoder defense was advanced by the parents, alleging that their religious beliefs were violated by the North Carolina compulsory school attendance law. As in Yoder the Court employed a balancing process between the state's interest in compulsory education on one hand, and the religious beliefs of parents regarding the upbringing of their children on the other hand. The parents were members of a religious sect called the Pentecostalists. It is significant that this religion

does not require that children be taught at home; in fact, the majority of children whose parents are members of the Pentecostal Church, which the Duros attended, are enrolled in a public school. This decision indicates that anyone who attempts to invoke the Yoder standards has a formidable challenge. To sustain a Yoder argument would require, as a minimum, that the religious belief be grounded on (1) membership in a recognized and organized religion, (2) that the religion be one with some history (the Amish have a 300-year history), and (3) that the religious beliefs be an on-going integral part of the life style of the communicants. The Fourth Circuit obviously did not believe that the Pentecostalist belief, at least the version put forth by the Duro parents, met the Yoder standard. The Court concluded that in this case North Carolina had established a compelling interest in compulsory education for the children of the state and that this interest overrides Duro's religious interest.

The last home instruction case, as well as the most recent, is a Georgia case previously cited, Roemhild v, State. Anyone reading the outcome of the 1980 Blankenship legal action in DeKalb County, Georgia, previously cited, could see that the Georgia compulsory attendance law suffered from a grave infirmity: the absence of a definition of what constitutes a private school. In Blankenship this lack of specificity resulted in a deadlocked jury and thus a mistrial. In Roemhild the Georgia Supreme Court held that a trial court's conviction of parents under the statute could not be sustained and thus reversed.

An examination of events relating to and preceding the Roemhild decision is an interesting study of the various political forces that emerged when an attempt was made to strengthen the Georgia compulsory school attendance statute. The statute reads as follows:

§20-2-690 (a) Every parent, guardian, or other person residing within this state having control or charge of any child or children between their seventh adn sixteenth birthdays shall enroll and send such child or children to a public or private school; and such child shall be responsible for enrolling and attending a public or private school under such penalty for noncompliance with this subsection as is provided in subsection (b) of this Code section unless his failure to enroll and attend is caused by his parent, guardian, or other person, in which case the parent, guardian, or other person alone shall be responsible; provided, however, that tests and physical exams for military service and the Natioal Guard and such other absences as may be approved by the State Board of Eduation or the local board of education shall be excused absences.

(b) Any parent, guardian, or other person residing in this state who has control or charge of a child or children and who shall violate this part shall be guilty of a misdemeanor and, upon conviction thereof, shall be subject to a fine not to exceed $100.00 or imprisonment not to exceed 30 days, or both, at the discretion of the court having jurisdiction. Each day's absence from school in violation of this part shall constitute a separate offense.

For a number of years visiting/attendance teachers in Georgia have expressed the need for a more specific attendance law. (In a personal conversation with the visiting teacher in the Blankenship action it was evident that this individual had a frustrating experience as a sworn witness, in justifying her actions based on a vague statute.) Both the State Superintendent as well as the State Board of Education were aware of the deficiency of the existing attendance statute. The key to any remedial action lay with the Georgia General Assembly. As events unfolded the General Assembly did indeed play the major role in determining the outcome, and thus moving the action to the level of the state's highest court.

A member of the Georgia General Assembly requested the Attorney General to respond to two questions: First, what constitutes a private school in the State of Georgia? Second, what is the present law governing parents teaching their children at home? In an unofficial opinion dated Dec. 6, 1982[26] the Attorney General opined that the lack of statutory or case law prevented a definitive answer to either of these questions. It is significant that he went on to state it would be at least theoretically possible for one to establish a private

school in one's home for the education of one's children, though whether or not such home instruction would satisfy the requirements of the compulsory school attendance law would "...likely turn on the particular facts of each case."[27] (It is interesting that this opinion is not cited in Roemhild.)

The State Superintendent requested his legal staff to draft guidelines to be used by all school districts in order to meet the requirements of the attendance law. These proposed guidelines were designed to go to the State Board of Education for consideration and possible adoption. (Policies, regulations, rules and standards adopted by the State Board of Education have the full force and effect of law.[28]) The proposed guidelines provided a definition of both public and private schools. In order to be considered a private school the following criteria would have to be met:

1. The school must have a minimum of 15 students regularly enrolled for at least 4½ hours daily and 180 days annually.
2. The school must have a facility primarily used for instruction, for which an occupancy certificate has been issued by fire inspection authorities.
3. The school must have a minimum of one teacher who is a college graduate of a regionally accredited institution.

The timing for this move by the State Board of Education was not the best since the General Assembly was in session. Heavy lobbying of the General Assembly and the Governor's office began when the proposed guidelines became known.

At this point a bill was introduced in the General Assembly that would specifically require that the State Board of Education be brought under the provisions of the Georgia Administrative Procedures Act.[29] This statute, if made applicable to the State Board of Education, would, in effect, require the State Board of Education to have all of its substantive action reviewed by the General Assembly prior to its becoming final.

The State Superintendent was successful in having the bill killed but he

had to make a concession to do so.

At the March 1983 meeting of the State Board of Education[30] the State Superintendent advised the Board that he had received a letter from the Governor, asking that this matter (proposed policy re criteria) be referred to the Governor's staff in order to "...review this issue and the ramifications thereof." At this point the Board decided that it would comply with the Governor's request and acted to remove the proposal from further consideration.

As a result of the State Board's action and the Roemhild decision one could say that Georgia's present compulsory attendance law is in limbo. It is reasonable to conclude that no school district will attempt to follow the law insofar as home instruction is concerned.

In examining the Roemhild decision the Georgia Supreme Court extensively cited Popanz,[31] the Wisconsin Supreme Court decision. It was stipulated in the evidence that the State Department of Education has no authority to regulate private schools and cannot therefore require certification of private school teachers, and that the state law does not define what is meant by a private school.[32] As a consequence of this absence of definition of a private school the attendance statute violates a due process value in that it impermissibly delegates to local law enforcement officials, judges, and juries the policy decision of what constitutes a "private school."[33] The Court refers to this inadequacy as being perhaps the statute's most notable one.

It would appear from an analysis of Pomanz and Roemhild that the Free Exercise clause argument is not needed by parents electing to educate their children at home if the state's compulsory school attendance statute fails to provide a proper definition of "private school."

It is interesting that in Duro, where the parent based his argument primarily on the Free Exercise clause, the Fourth Circuit chose to apply

the Yoder standard and consequently the parent failed to sustain his case. This decision was rendered despite the fact that it was stipulated that North Carolina had deregulated nonpublic education. But the Court refused to accept the district court's ruling that by this deregulation the state had abdicated its interest in the quality of education received by students in nonpublic schools.

The balance between public policy and free exercise of religion has never been easy for the U.S. Supreme Court to determine. Wisconsin v. Yoder (1972) saw the U.S. Supreme Court adopting a rather expansive position with respect to protection afforded those who wish to made an educational choice based on religious beliefs. Since Wisconsin v. Yoder, however, the Court has consistently refused to apply the Yoder standards to those who, because of personal religious conviction, choose to ignore a state's compulsory education law and educate their children at home.

Wisconsin v. Yoder is a leading case where a claim of religious liberty is put forward by a parent who elects to teach his children at home. It has already been pointed out that a majority of state courts have refused to extend the rights accorded the Amish parents to those of individual parents wishing to teach their children at home on religious grounds.

Perhaps it's time we considered the rights/wishes of children in these home instruction cases. We have certainly accorded students rights in In Re Gault,[34] Tinker v. Des Moines,[35] and Goss v. Lopez.[36]

The dissent by the late Justice Douglas in Wisconsin v. Yoder declares that the Court's analysis assumes that the only interests at stake are those of the Amish parents on the one hand, and those of the State on the other. Douglas claims that the problem with this approach is that, despite the Court's claim, the parents are seeking to vindicate not only their own free exercise

claims, but also those of their high-school-age children. Douglas says, "Religion is an individual experience. It is not necessary, nor even appropriate, for every Amish child to express his views on the subject in a prosecution of a single adult. Crucial, however, are the views of the child whose parent is the subject of the suit."[37] In In Re Gault, Justice Fortas states that it was held that "... neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[38] Justice Douglas states, in his dissent in Wisconsin v. Yoder: "On this important and vital matter of education, I think the children should be entitled to be heard. While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views."[39] Douglas deplores the fact that the Wisconsin courts did not bother to obtain the views of the two children. On that basis he wanted the matter explicitly reserved so that new hearings could be held on remand of the case.

Trust Douglas to have been concerned over the rights of children. Perhaps it's time the courts applied this concern to home instruction cases. Could it be that there are students being kept at home for instruction by parents who, given their rights, would prefer to attend a public or more conventional private school? Gault, Yoder, Goss and Tinker all point in the direction of recognizing the constitutional rights of students. Why not expand these rights to children involved in home instruction?

Apparently Circuit Judge Sprouse, in a concurring decision in Duro, was concerned that an inference would be drawn from the Duro decision that might suggest that the court should consider the rights of the children to choose to attend school as against their parents' religious interests. As he expressed it, "The only issue before the court is the constitutionality of a state statute which seeks to compel the Duro parents to send their children to school."[40] Circuit Judge Hall, author of the Duro decision, specifically addressed Judge Sprouse's

concern by stating that the court was not suggesting that the Duro children have a right to choose whether or not to attend public school. So much for Justice Douglas' dissent in Yoder.

In summary it would appear that absent a clearly defined compulsory school attendance law, wherein specificity is given to the term "private school," the state will not prevail against the claims of the growing number of parents who elect to teach their children at home. There is only one legal entity that can provide such specificity where it is not extant: the state legislature. Since any legislative remedy of this kind is fraught with significant political repercussions, especially in the South, any such changes will be slow in coming.

ENDNOTES

1. 268 U.S. 510 (1925).
2. Id. at 535.
3. 262 U.S. 390, 395 (1923).
4. 321 U.S. 158 (1944).
5. 98 U.S. 145 (1878).
6. 133 U.S. 333 (1890).
7. State v. Bailey, 157 Ind. 324, N.E. 730.
8. Sturges & Burn Mfg. Co. v. Beauchamp, 231 U.S. 320 (1913).
9. 321 U.S. 166.
10. N.C.G.S. Sect. 115c-547.
11. 406 U.S. 205 (1972).
12. 285 S.E. 2d 359 (1981).
13. Id. 367.
14. State v. Shaver, 294 N.W. 2d 883 (N.D. 1980); State v. Kasuboski, 275 N.W. 2d 101 (Wisc. Add. 1978); State v. Moorhead, 308 N.W. 2d 60 (Iowa 1981); but see State v. Nobel, No. 879-0015-A (Mich. Dist. Ct. Allegan County, Jan. 1980).
15. Hanson v. Cushman, 490 F. Supp.: 109 (W.D. Mich. 1980); Scoura v. Chicago Bd. of Education, 391 F. Supp. 452 (N.D. Ill. 1974); In the matter of Franz, 390 N.Y.S. 2d 940 (Sup. Ct. App. Div. 1977) but see Perchemlides v. Frizzle, No. 16641 (Super. Ct. Mass., Nov. 30, 1978).
16. State v. Lowery, 383 P. 2d 902 (Ks. 1963) but see People v. Levisen, 90 N.E. 2d 213 (Ill. 1950).
17. 84 Ga. App. 259 (1951).
18. O.C.G.A. 20-2-690.
19. La. App., 422 So. 2d 1357 (1982).
20. Or. App. 653 P. 2d 243 (1982).
21. Va. 297 S.E. 2d 799 (1982).
22. 332 N.W. 2d 750 (Wisc. 1983).
23. Ga. Supreme Court, No. 39735, decided Oct. 25, 1983.

24. 683 P. 2d 374 (N.M. App. 1983).

25. 712 F. 2d 96 (1983).

26. 1982 Op. Attorney Gen. No. U82-43.

27. Id. at 298.

28. O.C.G.A. 20-2-280.

29. O.C.G.A. 50-13-1 to 50-13-7.

30. Georgia State Board of Education Minutes of meeting of March 10, 1983, p.5.

31. 332 N.W. 2d 750.

32. Roemhild v. State at 4.

33. Id. at 8.

34. 387 U.S. 1 (1967).

35. 393 U.S. 503 (1969).

36. 419 U.S. 565 (1975).

37. Wisconsin v. Yoder at 243.

38. In Re Gault at 13.

39. Wisconsin v. Yoder at 244.

40. Duro at 11.